

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

RECODIFICATION OF RULES)	Administrative Cause
FOR FLOOD PLAIN)	Number: 08-004W
MANAGEMENT)	(LSA Document #08-72(F))

RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULE

A. INTRODUCTION

For consideration is the final adoption of the recodification of the rules pertaining to flood plain management (312 IAC 10). This article includes 312 IAC 10-1 (Application); 312 IAC 10-2 (Definitions); 312 IAC 10-3 (Flood Plain Delineations and Management); 312 IAC 10-4 (Floodway Licensing); and, 312 IAC 10-5 (General Licenses and Specific Exemptions from Floodway Licensing). The text of 312 IAC 10 is available through the website of the Legislative Services Agency at the following address:

<http://www.in.gov/legislative/iac/T03120/A00100.PDF>

In April 2002, the Natural Resources Commission approved delegations of authority with respect to recodifications. Where no amendments are proposed, and rules would be readopted in their current form, the Director of the Division of Hearings may approve preliminary action. The standard practice would be to readopt by article. The Commission retained authority to take final action on recodifications.

No amendments were proposed to the rule article, 312 IAC 10, and they would be readopted in their current form. The Director of the Division of Hearings approved preliminary action. 312 IAC 10 is submitted for consideration as to final action.

B. RECODIFICATION ANALYSES UNDER IC 4-22-2-3.1

On June 17, 2008, George C. Bowman, Assistant Director for the Division of Water, provided analyses for the proposed readoption to consider potential impacts to small business and to provide justifications. His analyses provided:

MEMORANDUM

Subject: Small Business Impact Analysis for Recodification of Floodplain Management Rules (312 IAC 10); LSA Document #08-72

**From: George C. Bowman, P.E.
DNR Division of Water**

**To: Steve Lucas, Hearing Officer
NRC Division of Hearings**

Dated: June 17, 2008

Purpose

The purpose of this memorandum is to provide the analysis anticipated by IC 4-22 with respect to the recodification of 312IAC 10 pertaining to the Natural Resources Commission. 312 IAC 10 consists of rules 1 through 5.

Rule 1: Application

This rule outlines the purpose and scope of Floodplain Management rules with respect to the authorities and directives outlined in IC 14-28-1 and IC 14-28-3. This rule sets forth the mechanism to establish minimum standards for the delineation and regulation of flood plains to decrease existing flood damages, mitigate future flood damages, and promote the health, safety, and welfare of the people of Indiana. These minimum standards are written with an understanding of the legislative declaration that the loss of lives and property caused by floods and the damage resulting from floods is matter of deep concern to Indiana affecting the life, health, and convenience of the people and the protection of property. Floodways should not be inhabited and should be kept free and clear of interference or obstructions that will cause any undue restriction of the capacity of floodways. The water resources of Indiana that have been diminished should be accumulated, preserved, and protected to prevent any loss or waste beyond reasonable and necessary use. This rule also establishes that a county or municipality must not authorize a structure, obstruction, deposit, or excavation within a floodway without the applicant first receiving a license from the Department under IC 14-28-1. The rule does not impose any requirements or costs on small businesses under IC 4-22-2.5-3.1.

Rule 2: Definitions

This rule provides definitions with applicability to IC 14-28-1, IC 14-28-3, and 312 IAC 10. The rule does not impose any requirements or costs on small businesses under IC 4-22-2.5-3.1.

Rule 3: Flood Plain Delineations and Management

This rule establishes that a flood plain, floodway and fringe exist for each waterway even if an area is not delineated on a map and that a county or municipality that administers IC 14-28-3 must adopt an ordinance to implement this rule within the flood plain, floodway and fringe. Flood plains (or floodways and fringe) that have been designated by the Federal Emergency Management Agency for a flood insurance study under 44 CFR 60.3 shall be used for regulatory purposes. In the absence of a Federal Emergency Management Agency designation, the department or another person subject to the review and approval of the Department may delineate flood plains and floodways subject to requirements set forth in the rule. This rule also establishes procedures for when the Natural Resources Commission may designate a floodway. The rule also establishes minimum criteria for the construction of a building with a floor area greater than 400 square feet in a flood plain, defines role and responsibility of local government authorities to issue a local license for a structure, an obstruction, a deposit, or an excavation within a floodway or flood plain, authorizes a temporary licenses for recreational vehicles in a floodway or flood plain subject to certain conditions, and establishes criteria for non-conforming uses in the flood plain. This rule imposes cost on small businesses that undertake construction, excavation, or fill activities within the floodway and floodplain area. The costs incurred are those necessary to comply with minimum federal and state requirements to minimize damage to property by means of floodwaters. In most cases, these costs are associated with elevating buildings above the 100-year frequency flood level. Minimum federal standards require these buildings to have their lowest floor at or above the 100-year flood elevation while this rule requires the buildings to have their lowest floor located 2' above the 100-year flood elevation. The cost of this additional elevation requirement can often be offset by a reduction in flood insurance premiums for the buildings. As was illustrated during the June 2008 Floods, structures that were elevated 2' above expected 100-year flood levels received less flood damage, if any at all, than those that had their lowest floor elevation at the 100-year flood level. Those businesses that were located in a floodplain and had their buildings elevated to the higher requirement are able to reopen their business, while others are still cleaning up from the flood damage. The costs associated with lost income, clean up and building repairs due to flooding could have been avoided by elevating these buildings to the higher standards set forth by this rule.

Rule 4: Floodway Licensing

This rule establishes that a license from the Department is required to erect, make, use, maintain, suffer, or permit a structure, obstruction, deposit, or excavation in or on a floodway. Development and maintenance of crops, pastures, forests, and parks and recreational use are exempted from licensing requirements unless the activities involve the placement of a structure, obstruction, deposit, or excavation. The rule also establishes the criteria for constructing additions to lawful abodes in the floodway provided the addition does not increase the market value by more than fifty (50%) percent of the market value of the original structure when it was originally constructed. It also sets forth the requirements for the completion of an appraisal for use in the building's market value determination. Additionally, this rule sets forth criteria

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regarding the application of flood easements. Costs to small businesses and other regulated entities for the preparation of a certificate of approval are those resulting from IC 14-28-1. The timing requirements apply to small businesses and other regulated entities, as well as the Division, and they are justified for the orderly and considered dispositions of applications for certificates of approval. The rule does not impose any requirements or costs on small businesses.

Rule 5: General Licenses and Specific Exemptions from Floodway Licensing

This rule sets forth the eligibility requirements for a general license for the following project types: Wetland Restoration Measures; Utility Line Crossings; Aerial Electric, Telephone, or Cable Television Lines; Removal of Logjams from a Waterway; Qualified Logjam and Sandbar Removals from beneath Bridges, and Qualified Outfall Projects. General and specific criteria are provided for each of the project types. Depending on the project type the general license may require notification to the Department. In those instances where written notification to the Department is required, the Department must respond to the request for a general license within ten (10) business days or else the general license is deemed to be valid by default. The rule serves to lessen the costs to small businesses whose activities are regulated under IC 14-28-1 in two ways. The most measurable savings occurs when a small business activity qualifies for a general license. For an activity that qualifies for a general license the applicant does not have to pay the typical application fee of \$200 and the notification of adjacent landowners is not required therefore, the applicant saves on mailing costs associated with providing either certified mail or first class mail with return receipt to adjacent landowners as required under IC 14-11-4 and 312 IAC 2-3-3. Depending on project size and/or location, the savings could be substantial. Also, the level of plan preparation for submittal to the Department is greatly reduced; therefore, additional savings are realized in the preparation of project plans and drawings. The second type of savings is a time savings associated with the cost of doing business. Activities subject to regulation under IC 14-28-1 that must undergo a formal permit review take approximately 90 to 120 days on average to process, while activities that may qualify for a general license must be processed in ten (10) business days. When comparing these processing times to those for activities that may qualify for a general license, the time savings is significant. This time savings can be a benefit in reducing the overall costs of operating the small business. The downside to this rule is that small businesses, such as engineering firms that typically prepare project plans and specifications for the small businesses that have activities regulated under IC 14-28-1, have less work to do for an activity that qualifies for a general license; therefore, while their client experiences a savings this is still lost income to the engineering firm.

General Overview Concerning Comments and Complaints

In addition to the rule specific descriptions provided above, the following general overview is provided.

The continued need for the rule.

The rule is necessary for the continued implementation of the regulatory programs administered by the Department and authorized under the statutory authority of IC 14-28-1 and IC 14-28-3.

The nature of any complaints or comments received from the public, including small businesses, concerning the rule or the rule's implementation by the agency.

In most cases, the overall complaint regarding the rules is that more types of construction activities should be covered by a general license. Any rule that shortens the permit process is viewed favorably by the regulated community, including small businesses.

The complexity of the rule, including any difficulties encountered by:

(a) the agency in administering the rule; or

Any difficulties encountered through the course of administering the rule have been addressed by amending the rule when needed.

(b) small businesses in complying with the rule.

Because the rule has been around for a number of years, small businesses have learned to incorporate the permitting process into their planning and development. Compliance with the rule requirements is generally not an issue.

The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, or local laws, rules, regulations, or ordinances.

In general the rule duplicates federal regulations contained in 44 CFR §59 and 60 regarding floodplain management. This duplication is necessary for the state to participate in the National Flood Insurance Program. These rules mirror the minimum federal standards except in those instances where the State has chosen to be more restrictive. This is most evident in the requirement to have a building's lowest floor located 2' above the 100-year frequency flood elevation as opposed to the federal requirement of being at the 100-year flood. While many have objected to this additional elevation requirement at the time of construction, many of those same individuals were spared from damage by floodwaters during the June 2008 Floods because they had been required to elevate the additional 2'. In most cases, local floodplain regulations mirror the federal and state floodplain regulations; however, the locals are also encouraged to adopt more restrictive regulations where they see fit.

The length of time since the rule was last reviewed under this section or otherwise evaluated by the agency, and the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule since that time.

The rules were last amended in 2001 and 2004 to further promote uniformity throughout the floodplain in building elevation requirements and address problems associated with administering general licenses for certain types of projects. Advancements in construction practices and the implementation of best

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management practices made these rule modifications reasonable and necessary to promote the preservation and protection of the natural resource while reducing business costs associated with obtaining a permit. Current economic conditions, advancements in technology and other factors have not changed in a way since 2004 that would warrant rule modifications at this time.

C. NOTICE OF INTENT TO READOPT AND RECOMMENDATION FOR FINAL ACTION

A “Notice of Intent to Readopt” 312 IAC 10 was published in the Indiana REGISTER on February 13, 2008 as anticipated by IC 4-22-2.5-2 and IC 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 10 without changes. The notice provided that a person had 30 days to submit a written request to the Natural Resources Commission seeking to have a particular section of the rule be readopted separately from the general recodification. If such a request had been made, the Commission would have been required to complete the full rule adoption process for the section. No written request was made. Where no request is received, the Commission may either submit the rule for filing with the Publisher under IC 4-22-2-35 or elect the procedure for recodification under IC 4-22-2. The hearing officer recommends the Commission approve submittal of the rule for filing with the Publisher.

Dated: June 18, 2008

Stephen L. Lucas
Hearing Officer